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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1710

ODELL ANDREWS and WILLIE SLOAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is reported at 439 F.2d 155. A prior opinion of the court of appeals in this case (Pet. App. B) is reported at 426 F. 2d 1304.[1]

[1] The majority opinion on the earlier appeal was amended, in a manner not material here, subsequent to its issuance. The copy of the opinion contained in Appendix B of the petition is the original version; the opinion as reported reflects

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1971. On May 13, 1971, Mr. Justice Douglas extended petitioners' time for filing a petition for a writ of certiorari until May 14, 1971, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, following reversal of petitioners' non-jury convictions for marihuana offenses on the basis of this Court's decision in *Leary* v. *United States*, 395 U.S. 6, striking down the provision in 21 U.S.C. 176a permitting knowledge of illegal importation of marihuana to be inferred from unexplained possession, it was proper for the district judge, without taking additional evidence, simply to state on the record that he then found the requisite knowledge of illegal importation from the totality of the evidence, without reliance on the statutory inference.

2. Whether inadmissible hearsay was received at the trial.

3. Whether the evidence supported the finding that petitioners possessed the marihuana involved in Count Two.

4. Whether petitioners were improperly coerced into waiving their right to a jury trial by the pro-

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the amendment. The amendment consisted of striking the first two sentences of the second paragraph of the opinion as originally issued and making the last sentence of that paragraph the first sentence of the next paragraph.

vision of 21 U.S.C. 176a authorizing conviction of marihuana offenses from proof of possession of the marihuana unless the possession is explained to the satisfaction "of the jury."

STATEMENT

1. Following a non-jury trial in the United States District Court for the Central District of California, petitioners were convicted on both counts of a two-count indictment charging that they, a codefendant named Gene Christian,[2] and two unindicted persons, Michael Bucher and Buck Robinson, had conspired to smuggle approximately 70 kilograms of marihuana into the United States from Mexico and to receive and conceal the same after its unlawful importation (Count One) and that petitioners had received, concealed, and facilitated the transportation of one kilogram of the marihuana with knowledge that it had been unlawfully imported (Count Two), in violation of 21 U.S.C. 176a (1 R. 4, 5; Pr. R. 2-5; Tr. 250-251).[3] Each petitioner was sentenced to five years' imprisonment on each count, the sentences to run

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[2] Christian, a fugitive, had not been apprehended as of the time of the trial (Tr. 236).

[3] "1 R." and "2 R." refer to the certified record, in two volumes, of the district court proceedings following the court of appeals' first decision (reversing petitioners' original convictions and remanding for further proceedings, see *infra*). "Pr. R." refers to the certified clerk's record (marked "prior case" on the cover) of the original trial proceedings, consisting of the indictment and pre-remand pleadings. Both records are on file in the Clerk's office. "Tr." refers to the trial transcript, a copy of which is being lodged herewith.

concurrently. Pursuant to 18 U.S.C. 4208(a)(2), each was declared eligible for parole at such time as the Board of Parole should direct (Pr. R. 30, 31).

On petitioners' initial appeal, the court of appeals reversed the convictions and remanded the case for further proceedings, because it was unclear to the court from the record whether the district court had relied on the provision in 21 U.S.C. 176a permitting knowledge of illegal importation—an element of the offense—to be inferred from the unsatisfactorily explained possession of marihuana, the provision later held invalid in *Leary* v. *United States*, 395 U.S. 6 (Pet. App. B). On remand, the district judge who had presided at the trial simply stated on the record, without taking additional evidence, that he had reviewed the trial transcript and was then finding from the totality of the evidence, without reliance on the statutory inference, that petitioners had known that the marihuana they had been found with had been unlawfully imported (1 R. 3; 2 R. 6-7).[4] The judgments of conviction and resultant sentences were thus reinstated (1 R. 4, 5; 2 R. 7-8). Thereafter another panel of the court of appeals unanimously affirmed (Pet. App. A).[5]

2. The underlying facts are as follows: On December 16, 1967, coconspirator Robinson asked co-

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[4] Petitioners' statement that the judge stated in the proceedings on remand that he had not relied on the statutory inference "in the first instance" (Pet. 23, 25-26) is incorrect. The pertinent finding was worded in the present tense.

[5] One judge—a member of the original majority—sat on both panels.

conspirator Bucher, in Mexico, to drive an automobile containing marihuana to Los Angeles (Tr. 81, 84). Bucher agreed and Robinson wrote a telephone number, followed by a dash and the letter "O," on a slip of paper which he gave Bucher so that Bucher would know whom to call when he arrived (Tr. 89-90). Robinson told Bucher that the "O" meant "Odell," which Bucher understood to refer to petitioner Odell Andrews—Bucher had met Andrews some ten times previously and had delivered marihuana to him at least once before in the same vehicle he used on this occasion. The telephone number was in fact listed in Andrews' name (Tr. 90, 149-150, 169-170, 203-204). Early that evening, pursuant to the agreement, Bucher drove a 1957 Oldsmobile, loaded with 74 kilograms of marihuana secreted in compartments behind the headlights and taillights and under the front seat, to San Ysidro, California, a port of entry. Customs agents there discovered and removed the marihuana and arrested Bucher, who, after consulting a lawyer, agreed to cooperate with the government (Tr. 21-26, 36-37, 40, 48, 87-88). An agent placed a one-kilogram brick of the confiscated marihuana back in the Oldsmobile, but in a part of it, the trunk compartment, where none had been previously (Tr. 47-48). Accompanied by agents, Bucher then proceeded to Los Angeles (Tr. 37, 42, 49).

After arriving in Los Angeles, Bucher called the number Robinson had given him and told codefendant Christian—who answered—that he had a 70-

kilogram load, that the price was $28 per kilo, and that Christian should "take care of it" (Tr. 88-89, 91, 101-104). Some fifteen minutes later, petitioner Sloan met Bucher, got into the Oldsmobile with him, and directed him to a garage at the rear of petitioner Andrews' house, where three days previously Bucher had made a 69-kilogram delivery of marihuana to petitioners in the same automobile (Tr. 43, 58-59, 106-108, 196, 203-204). Petitioner Andrews was waiting in the garage when Bucher and Sloan arrived (Tr. 109-110). Using pliers and a screwdriver, petitioners promptly started removing the headlights and taillights and told Bucher to start getting the marihuana out from under the front seat (Tr. 110, 117, 134-135). When Andrews, after removing a headlight, found the compartment in back of it empty, he asked Bucher where the marihuana was that was supposed to be there (Tr. 124). Sloan asked whether "they" had forgotten to put the marihuana in the space (Tr. 125-126). When, moments later, petitioners were arrested, Andrews had $2,000 in currency on his person (Tr. 60-62).

ARGUMENT

1. There is no merit to petitioners' contention that they were entitled to a new trial following the court of appeals' remand (Pet. 23-27). The sole reason for the remand was the court's uncertainty from the record whether the judge at the non-jury trial had relied on the statutory inference later invalidated in *Leary*. The terms of the limited remand were fully

complied with when the judge, following review of the evidence, stated on the record that he was then finding, from all the evidence and without reliance on the invalidated inference, that petitioners had known that the marihuana in question was illegally imported. If supported by the evidence, that finding was valid and made a new trial unnecessary. Cf. *Campbell* v. *United States*, 365 U.S. 85, 98-99; *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 245-246.

The evidence fully supported the finding. Here an actual smuggling scheme was involved and the evidence showed "actual knowledge of * * * the plan of illegal importation" (*McClain* v. *United States*, 417 F. 2d 489, 491-492 (C.A. 9), certiorari denied, 397 U.S. 965). Petitioners' activities in the garage, in attempting to find in the secret compartments of the loaded vehicle the marihuana that had been placed therein by Robinson in Mexico, warranted the inference that petitioners were well aware of the Mexican origin of the marihuana they were expecting to receive and that the plan contemplated its unlawful importation.

2. Robinson's statements to Bucher in Mexico, testified to by Bucher at trial, did not involve hearsay, as petitioners contend (Pet. 32-40). The statements were offered not as proof of the truth of the matter stated—the characteristic attribute of hearsay (1 Wharton, *Criminal Evidence*, § 249 (1955)) —but as evidence of the conspiracy. The statements, in substance a request by Robinson that Bucher de-

liver the marihuana to petitioner Andrews, thus, if probative, had "no special evidentiary hurdle to overcome" (*United States* v. *Costello*, 352 F. 2d 848, 854 (C.A. 2), reversed on other grounds *sub nom. Marchetti* v. *United States*, 390 U.S. 39). The request—to which Bucher directly attested—was plainly probative of the charged conspiracy. Moreover, to the extent Robinson's statements might arguably be deemed to have involved hearsay, they were in any event admissible under the so-called coconspirator exception to the hearsay rule—the principle that declarations by one conspirator, made during and in furtherance of the joint enterprise, are admissible against each coconspirator. *Wong Sun* v. *United States*, 371 U.S. 471, 490; *Lutwak* v. *United States*, 344 U.S. 604, 617-618; *Krulewitch* v. *United States*, 336 U.S. 440, 442-443; *Fiswick* v. *United States*, 329 U.S. 211, 217; *Glasser* v. *United States*, 315 U.S. 60, 74-75. That exception, contrary to a suggestion of petitioner (Pet. 37-40), does not violate the Confrontation Clause of the Sixth Amendment. *Dutton* v. *Evans*, 400 U.S. 74.

3. Petitioners contend that they cannot be deemed to have possessed the one-kilogram brick of marihuana that was in the trunk of the Oldsmobile when Bucher delivered the vehicle to them because they were unaware of its presence there, and that consequently their conviction on Count Two (charging that they received, concealed, and facilitated the transportation of this marihuana) cannot stand (Pet. 41-46). We submit, however, that the trial judge's finding that petitioners possessed this marihuana—

"because the car was * * * in their possession with the marihuana in it" (Tr. 250)—was, in the unique circumstances of this case, correct. While admittedly petitioners were unaware of the precise location of the marihuana in the car, the fact remains that they possessed an automobile which they believed contained and which did contain marihuana. Moreover, that marihuana had been part of the larger load they assumed was still there. At all events, since petitioners' sentences on Count Two are to run concurrently with their like sentences on the conspiracy count (the validity of which is not affected by the present contention), the concurrent sentence rule is applicable and consideration of the Count-Two conviction may be pretermitted as a matter of judicial convenience. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *McGee* v. *United States*, No. 362, this Term, decided May 17, 1971, slip op., p. 12, n. 15.

4. Petitioners' contention that they were coerced into waiving their right to a jury trial (Pet. 28-31) is without substance. They argue that because 21 U.S.C. 176a, prior to *Leary*, relieved a defendant from the statutory interference of illegal importation only if his possession of marihuana was explained to the satisfaction "of the jury," only "the jury" could make the statutorily authorized inference—the court sitting without a jury could not do so. Accused persons were thus allegedly subjected to undue pressure to forego their right to a jury trial and to elect to be tried by a judge in order to avoid the statutory inference. The rationale of *United States* v. *Jackson*,

390 U.S. 570 (holding invalid the provision of the Federal Kidnaping Act authorizing the death penalty only upon the jury's recommendation) is invoked. Petitioners, however, misconstrue the pertinent provision of 21 U.S.C. 176a; the term "jury" as used there and in similar statutes (*e.g.*, 21 U.S.C. 174) clearly was intended to refer generally to the trier of fact—whether a jury or the judge at a jury-waived trial. *McClain* v. *United States*, *supra*, 417 F. 2d at 492-493, and cases there cited. Hence the statutory inference could be applied by judge or jury alike and the rationale of *Jackson* is inapposite.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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